In the Supreme Court
OF THE
United States

OCTOBER TERM, 1946

No. 158

J. E. HADDOCK, LIMITED, and UNITED PACIFIC INSURANCE COMPANY,
Petitioners,

vs.

WARREN H. PILLSBURY, Deputy Commissioner, and HUGH A. VORIS, Assistant Deputy Commissioner, of the United States Employees' Compensation Commission for the 13th Compensation District, and ADELA F. MUCH,
Respondents.

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit.

FRANK J. CREEDE,
220 Bush Street, San Francisco 4, California,
Counsel for Petitioners.

KEITH, CREEDE & SEDGWICK,
McCOMB & NORDMARK,
GODFREY NORDMARK,
220 Bush Street, San Francisco 4, California,
Of Counsel.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

Subject Index

Table of Authorities Cited

Rules

Statutes

Texts

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1946

No.

J. E. HADDOCK, LIMITED, and UNITED PACIFIC INSURANCE COMPANY,
Petitioners,

vs.

WARREN H. PILLSBURY, Deputy Commissioner, and HUGH A. VORIS, Assistant Deputy Commissioner, of the United States Employees' Compensation Commission for the 13th Compensation District, and ADELA F. MUCH,
Respondents.

PETITION FOR WRIT OF CERTIORARI

to the United States Circuit Court of Appeals for the Ninth Circuit.

To the Honorable Supreme Court of the United States:

Petitioners, J. E. Haddock, Limited, and United Pacific Insurance Company, respectfully pray for a

writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit to review the final judgment of said court in the above entitled cause, entered April 5, 1946, dismissing their appeal from the judgment of the District Court of the United States for the Northern District of California, Southern Division.

OPINIONS BELOW.

No opinion was rendered by the Circuit Court of Appeals in dismissing the appeal on April 5, 1946. (R. 194-195.) The opinion rendered by the said court on May 2, 1946, in denying the petition for rehearing, is contained in the record. (R. 199-203.)

SUMMARY STATEMENT OF THE MATTER INVOLVED.

Petitioners brought injunction proceedings in the District Court to set aside an award of compensation made by the respondent Deputy Commissioner under the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C.A., secs. 901-950) in favor of respondent Adela F. Much. (T. 2-9.) In the prayer to their complaint, filed July 28, 1944 (R. 15), they asked that the Deputy Commissioner be required to certify to the court a record of his proceedings, including the testimony and evidence upon which he acted. They asked for a temporary injunction. And they asked for a mandatory injunction, after full hearing, setting aside the compensation award. (R. 8-9.)

A motion for a temporary injunction was denied on August 14, 1944. (R. 196.) On October 12, 1944, the Deputy Commissioner filed his certified copy of the record, including the testimony and evidence. (R. 32-186.) On the next day, and based upon the complaint and the said certified record, the Deputy Commissioner filed a motion, under Rule 41 of the Federal Rules of Civil Procedure (28 U.S.C.A., fol. sec. 723c) to dismiss the complaint on the ground that upon the facts and the law the complainants had shown no right to relief. (R. 17-18.) After hearing, briefing, and submission (R. 196-197), the court rendered a "Memorandum Opinion and Order Sustaining Order of Compensation Commissioner", on March 15, 1945. (R. 18-19.) This "memorandum opinion and order" contained a brief review of the facts and the law and ended with the words, "The order of the Compensation Commissioner is sustained and the complaint is dismissed". (R. 19.) It was filed with the clerk and noted in the civil docket of the court on March 15, 1945. (R. 197.) Petitioners did not appeal or attempt to appeal from the "memorandum opinion and order" of March 15, 1945.

On June 7, 1945, respondents prepared and lodged with the clerk of the court their proposed findings of fact and conclusions of law. (R. 20-23.) These conformed to the requirements of Rule 52 (a) of the Federal Rules of Civil Procedure (28 U.S.C.A., fol. sec. 723c) as well as Admiralty Rule 46½ (28 U.S. C.A., sec. 723). They were signed by the trial court and filed with the clerk on June 14, 1945. (R. 23.) Pursuant to Rule 58 of the Federal Rules of Civil

Procedure (28 U.S.C.A., fol. sec. 723c), respondents prepared and submitted to the trial judge a form of judgment which he approved and signed on August 27, 1945. (R. 23-24.) This judgment dismissed the complaint "without leave to amend", affirmed the award of compensation, and required each party to pay "its" own costs. (R. 24.) It was filed with the clerk and noted in the civil docket of the court on August 27, 1945. (R. 197.) Petitioners filed their notice of appeal therefrom on September 14, 1945. (R. 25.)

When the appeal came on for hearing, it was dismissed by the Circuit Court of Appeals without opinion. (R. 193-194.) The court held that it did not have jurisdiction to entertain an appeal from the judgment entered on August 27, 1945. It held that the "memorandum opinion and order" of March 15, 1945, was the final judgment in the action. It held that the operative effect thereof was to render idle, meaningless, and purposeless the actions of the trial court and counsel respecting findings of fact and conclusions of law and a judgment based thereon. It held that the operative effect of the "memorandum opinion and order" of March 15, 1945, was to render abortive any appeal or attempted appeal from the judgment entered on August 27, 1946. It adhered to these holdings in denying the petition for rehearing. (R. 198-203.)

JURISDICTION.

Jurisdiction of this court is invoked under section 240 (a) of the Judicial Code, as amended. (28 U.S. C.A., sec. 347.)

QUESTIONS PRESENTED.

1. Did the Circuit Court of Appeals have jurisdiction to entertain the appeal from the judgment entered in the District Court on August 27, 1945?

2. Is a suit to set aside an award of compensation under the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C.A., secs. 901-950), a suit in admiralty and subject to the principles of admiralty jurisprudence?

3. Where the District Court and counsel for the litigants therein regarded a "memorandum opinion and order" as preliminary to formal findings of fact and conclusions of law and judgment and acted accordingly, is it a fair standing of procedure for a Circuit Court of Appeals to regard such "memorandum opinion and order" as the final judgment in the action?

STATUTES AND RULES OF COURT INVOLVED.

1. On the first question:

Rule 41 (b), Federal Rules of Civil Procedure (28 U.S.C.A., fol. sec. 723c):

> "* * * After the plaintiff has completed the presentation of his evidence, the defendant, with-

out waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. * * *"

Rule 52 (a), Federal Rules of Civil Procedure (28 U.S.C.A., fol. sec. 723c):

"In all actions tried upon the facts without a jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; * * *"

Rule 58, Federal Rules of Civil Procedure (28 U.S. C.A., fol. sec. 723c):

"* * * When the court directs the entry of a judgment that a party recover only money or costs or that there be no recovery, the clerk shall enter the judgment forthwith upon receipt by him of the direction; but when the court directs entry of judgment for other relief, the judge shall promptly settle or approve the form of the judgment and direct that it be entered by the clerk. * * *"

2. On the second question:

Section 21 of the Longshoremen's and Harbor Workers' Compensation Act (44 Stat. 1436; 33 U.S. C.A., sec. 921):

"(b) If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making

the order, and instituted in the Federal district court for the judicial district in which the injury occurred (or in the district court of the United States for the District of Columbia if the injury occurred in the District). The orders, writs, and processes of the court in such proceedings may run, be served, and be returnable anywhere in the United States. The payment of the amounts required by an award shall not be stayed pending final decision in any such proceeding unless upon application for an interlocutory injunction the court, on hearing after not less than three days' notice to the parties in interest and the deputy commissioner, allows the stay of such payments, in whole or in part, where irreparable damage would otherwise ensue to the employer. The order of the court allowing any such stay shall contain a specific finding, based upon evidence submitted to the court and identified by reference thereto, that such irreparable damage would result to the employer, and specifying the nature of the damage."

Admiralty Rule 46½ (28 U.S.C.A., sec. 723):

"In deciding cases of admiralty and maritime jurisdiction the court of first instance shall find the facts specially and state separately its conclusions of law thereon; and its findings and conclusions shall be entered of record and, if an appeal is taken from the decree, shall be included by the clerk in the record which is certified to the appellate court under rule 49."

Rule 81 (a), Federal Rules of Civil Procedure (28 U.S.C.A., fol. sec. 723c):

These rules "apply to proceedings for enforcement or review of compensation orders under the

Longshoremen's and Harbor Workers' Compensation Act, Act of March 4, 1927, c. 509, secs. 18, 21 (44 Stat. 1434, 1436), U.S.C., Title 33, secs. 918, 921, except to the extent that matters of procedure are provided for in that Act."

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT.

1. **THE DECISION OF THE CIRCUIT COURT OF APPEALS INVOLVES AN IMPORTANT QUESTION, ON WHICH THE DECISIONS ARE IN CONFLICT, RESPECTING THE PROPER PROCEDURE AFTER A MOTION TO DISMISS IS GRANTED UNDER RULE 41 (b) ON THE GROUND THAT UPON THE FACTS AND THE LAW A PLAINTIFF HAS SHOWN NO RIGHT TO RELIEF.**

The Circuit Court of Appeals viewed the informal "memorandum opinion and order" of March 15, 1945, as the final judgment in the action, and accordingly decided that it did not have jurisdiction to entertain the appeal from the formal judgment of August 27, 1945. The formal judgment, approved by the court under Rule 58, was based upon findings of fact and conclusions of law conforming to Rule 52 (a). The informal "memorandum opinion and order" was lacking in these respects. If it be determined, therefore, that the case was one in which it was mandatory upon the trial court to make findings of fact and conclusions of law, the error of the decision of the Circuit Court of Appeals is manifest.

The cases are uniform in holding that it is mandatory upon a trial court to make findings of fact and conclusions of law, pursuant to said Rule 52 (a), "in all actions tried upon the facts without a jury".

Kelley v. Everglades Drainage Dist., 319 U.S. 415, 417, 63 S.Ct. 1141, 1143, 87 L.Ed. 1485;

Mayo v. Lankland Highlands Canning Co., 309 U. S. 310, 316, 60 S. Ct. 517, 520, 84 L.Ed. 774;

Polaroid Corporation v. Markham, C.A.D.C. 1945, 151 F. 2d 89, 90;

Woodruff v. Heiser, 10 Cir. 1945, 150 F. 2d 869, 871;

Bowles v. Russell Packing Co., 7 Cir. 1944, 140 F. 2d 354, 355;

Brown v. Quinlan, 7 Cir. 1943, 138 F. 2d 228, 229.

The motion to dismiss in the present action (R. 17-18) was clearly under Rule 41 (b), for it was made on the ground that upon the law and the facts the complainants had shown no right to relief. The hearing thereon was in reality the trial of the action with the trial court having before it all the evidence consisting of the certified record of the proceedings before the Deputy Commissioner, including the evidence and testimony. Therefore, the determinative question is this: Was it mandatory upon the court in granting the motion to dismiss under Rule 41 (b) to make findings of fact and conclusions of law under Rule 52 (a)?

The decisions answering this determinative question are in conflict. The implied answer in the present case is in the negative. Heretofore the same court has answered the question in the affirmative. (*Young v. United States*, 9 Cir. 1940, 111 F. 2d 823, 824; *Perry v. Baumann*, 9 Cir. 1941, 112 F. 2d 409, 410.) An affirmative answer has also been given in the Sixth Circuit

(*Bach v. Friden-Calculating Mach. Co.*, 6 Cir. 1945, 148 F. 2d 407, 408-411), and in the Seventh Circuit (*Gary Theatres Co. v. Columbia Pictures Corp.*, 7 Cir. 1941, 120 F. 2d 891, 892). In the Third Circuit, however, the answer has been in the negative. (*Schad v. Twentieth Century-Fox Film Corp.*, 3 Cir. 1942, 136 F. 2d 991, 992-3.)

In view of the conflict of decisions, the importance of a decision on the subject by this court is obvious.

---

2. THE DECISION OF THE CIRCUIT COURT OF APPEALS IS IN CONFLICT WITH THE DECISIONS OF THIS COURT AND WITH ITS OWN DECISIONS ON IMPORTANT QUESTIONS IN THE ADMINISTRATION OF ADMIRALTY JURISPRUDENCE.

This court has declared that the jurisdiction conferred by section 21 (b) of the Longshoremen's and Harbor Workers' Compensation Act is admiralty jurisdiction.

Crowell v. Benson, 285 U.S. 22, 36-65, 52 S.Ct. 285, 287-98, 76 L.Ed. 598;

Alaska Packers Assn. v. Pillsbury, 301 U.S. 174, 175, 57 S.Ct. 682, 683, 81 L.Ed. 988.

The declarations of the Circuit Court of Appeals for the Ninth Circuit are to the same effect.

Twin Harbor Stevedoring & Tug Co. v. Marshall, 9 Cir. 1939, 103 F. 2d 513, 517 (Mathews, J.);

Crescent Wharf & Warehouse Co. v. Pillsbury, 9 Cir. 1938, 93 F. 2d 761, 762.

In exercising admiralty jurisdiction, the court may change or correct its decree after the determination of the case. (1 American Jurisprudence 605, sec. 114.) The awarding or withholding of costs is entirely under the control of the admiralty court. (*The Sapphire,* 18 Wall. (85 U.S.) 51, 21 L.Ed. 814, 816.) The final decision of an admiralty court "is not that which decides the substantial merits of the suit, but that which completes the decretal action of the court in the cause". (4 Benedict on Admiralty 17, sec. 554.) Hence, "as long as any order remains to be made, *as for costs* * * * the appeal cannot be taken before such order is entered". (4 Benedict on Admiralty 17, sec. 554.)

Under admiralty jurisprudence, the informal "memorandum opinion and order" of March 15, 1945, cannot be regarded as the final decision or decree in the case. It did not dispose of the entire case. For example, it left open and undetermined the matter of costs. (T. 18-19.) That matter was not determined until the formal judgment was entered on August 27, 1945—a judgment based upon findings of fact and conclusions of law which conformed not only to Rule 52 (a) of the Federal Rules of Civil Procedure but also to Admiralty Rule 46½. Therefore, under admiralty jurisprudence, the formal judgment of August 27, 1945, must be regarded as the final judgment in the action.

The Circuit Court of Appeals has held in effect that the admiralty jurisdiction of the District Court was impaired by Rule 81 (a) of the Federal Rules of Civil Procedure making those Rules applicable to proceed-

ings to review compensation awards under the Longshoremen's Act. (R. 201.) It held, in effect, that it was required to dismiss the appeal of petitioners because the District Court was not exercising admiralty jurisdiction. This was error. The applicability of these procedural rules to courts exercising admiralty jurisdiction cannot be deemed to oust them from exercising that jurisdiction and applying admiralty principles. Otherwise stated, nothing in those procedural rules makes it necessary to say that the informal "memorandum opinion and order" of March 15, 1945, was the final judgment in the action when, in fact, principles of admiralty jurisprudence require it to be said that the formal judgment of August 27, 1945, was the final judgment in the action.

---

3. THE DECISION OF THE CIRCUIT COURT OF APPEALS PRESENTS A SITUATION MERITING AN EXERCISE BY THIS COURT OF ITS SUPERVISORY POWER TO ESTABLISH AND MAINTAIN FAIR STANDARDS OF PROCEDURE IN SUBORDINATE FEDERAL COURTS.

As occasion arises this court has exercised its supervisory power to establish and maintain fair standards of procedure in subordinate federal courts. An exercise of that power was the basis for granting certiorari in *McNabb v. United States,* 318 U.S. 332, 333-342, 63 S.Ct. 608, 609, 612-614, 87 L.Ed. 819, and *Anderson v. United States,* 318 U.S. 350, 351, 63 S.Ct. 599, 87 L.Ed. 829, where the administration of criminal justice was concerned. The same supervisory power was exercised to attain substantial justice in *Rorick v. Commis-*

sioners, 307 U.S. 208, 213, 59 S.Ct. 808, 811, 83 L.Ed. 1242, and *Reconstruction Finance Corp. v. Prudence S. A. Group,* 311 U.S. 579, 583, 61 S.Ct. 331, 333, 85 L.Ed. 364, where the administration of appellate justice was concerned. Petitioners invoke that supervisory power.

Before the present decision, the Circuit Court of Appeals for the Ninth Circuit had advised subordinate courts that it was mandatory upon them to make findings of fact and conclusions of law in similar situations. (*Young v. United States,* 111 F. 2d 823, 824; *Perry v. Baumann,* 122 F. 2d 409, 410.) And it had advised appellants that in the matter of appeals the "memorandum opinion and order" of a trial judge would be regarded as the trial judge intended and regarded it. (*Uhl v. Dalton,* 151 F. 2d 502; *Peoples Bank v. Federal Reserve Bank of San Francisco,* 149 F. 2d 850, 851; *Monarch Brewing Co. v. George J. Meyer Mfg. Co.,* 130 F. 2d 582.)

By the present decision, however, the actions of the trial judge in complying with the previous decisions of the higher court are regarded as idle, meaningless, and purposeless, and the petitioners are deprived of a hearing on the merits of the appeal because they (and the same is true of the respondents) regarded the "memorandum opinion and order" of March 15, 1945, as the trial judge intended and regarded it.

That the trial judge did not regard the said "memorandum opinion and order" as the final judgment in the action is plain, for he made and signed findings of fact and conclusions of law and signed a judgment

based thereon. That the respondents did not regard the said "memorandum opinion and order" as the final judgment in the action is equally plain, for within the time in which petitioners might have appealed from said "memorandum opinion and order" had it been regarded as the final judgment in the action, respondents prepared and proposed the said findings of fact and conclusions of law, and later had the judgment of August 27, 1945, prepared, signed, and entered. Under such circumstances, if petitioners had attempted to appeal from the said "memorandum opinion and order" the dismissal of the appeal as premature would have been inevitable under the authorities just cited.

Manifestly, the Circuit Court of Appeals has approved a standard of procedure which is unfair to trial courts and appellants and opposed to substantial justice. Petitioners therefore invoke the supervisory power of this court to disapprove such standard and to permit the hearing of their appeal on the merits.

CONCLUSION.

Wherefore, petitioners respectfully pray that a writ of certiorari be issued to the United States Circuit Court of Appeals for the Ninth Circuit and that the final judgment of said court dismissing the appeal in said cause be reviewed and reversed.

Dated, San Francisco, California,
June 7, 1946.

FRANK J. CREEDE,
Counsel for Petitioners.

KEITH, CREEDE & SEDGWICK,
MCCOMB & NORDMARK,
GODFREY NORDMARK,
Of Counsel.